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No. 82-864

IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK, N.A., Co-Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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PETITIONERS' REPLY BRIEF

1. Judge Scott Had a Duty to Investigate the Imhoffs' Allegation of Fraud.

The Commissioner misreads the petitioners' position when he asserts that Judge Scott was under no compulsion to carry out Judge Quealy's stipulation order (Memorandum in Opposition, p. 4). Indeed, Judge Scott was guilty of the same misunderstanding. Petitioners did not and do not now suggest that Judge Scott was bound to default the Commissioner simply because the Government's attorney had failed to prepare the stipulation as ordered by Judge Quealy. It was not the failure to prepare the stipulation but the lie told to cover that failure which petitioners base their request for relief upon. Had Mr. Stewart confessed his dereliction to Judge Quealy and had the judge, despite the dismissal promised in his order, decided to grant a continuance, petitioners would agree with the Commissioner. However, Mr. Stewart deliberately misinformed the court, and thus Judge Quealy's decision was the product of fraud and not an exercise of discretion to which Judge Scott might properly defer.

Review of the relevant portions of the record clearly show that Judge Scott did not first make a finding with regard to petitioners' fraud allegation and then reach her decision in light of that finding: Judge Scott simply refused to hear the matter. (Petition for a Writ of Certiorari, pp. A54-A55). The Commissioner attempts to turn this infirmity to his advantage by suggesting that the absence of findings weakens petitioners' position and distinguishes the case from *Hazel-Atlas v. Hartford Co.*, 322 U. S. 328 (1944) (Memorandum in Opposition, p. 4 n.5,

p. 5 n.6). Obviously, petitioners cannot be faulted for the refusal of the Tax Court, as well as of the Third Circuit Court of Appeals, to hear evidence and make findings.

2. The Commissioner Ignores the Interests of the Judiciary and the Public Where an Attorney's Fraud Is Concerned.

The Commissioner would give a strict reading to *Hazel-Atlas, supra,* by finding in it a requirement that the fraud influence the court in reaching its decision on the merits. The Court in that case specifically stated, however, in language immediately following that quoted by the Commissioner (Memorandum in Opposition, p. 5): "Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal." *Id.* at 274. The Court, it is plain, did not grant relief from the judgment in *Hazel-Atlas* based on a finding that the fraud influenced the outcome. This aspect of *Hazel-Atlas* was specifically noted by Professor Moore and led to his formulation of the legal standard for fraud upon the court, which includes all "fraud perpetrated by officers of the court," adopted by many of the Circuit Courts of Appeal.[1] 7 J. Moore, *Federal Practice* ¶ 60.33, at 513-15 (2d ed. 1982).

In *Hazel-Atlas, supra,* this Court noted that attorneys' fraudulent conduct implicates not only the interests of the parties, but also of the judiciary as an institution set up

1. As noted by the Commissioner (Memorandum in Opposition, p. 6 n.7), the Sixth Circuit Court of Appeals reads Moore's formulation precisely as do the petitioners. *H. K. Porter Co. v. Goodyear Tire & Rubber Co.,* 536 F. 2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.").

to protect and safeguard the public. *Id.* 322 U. S. at 246. The instant case illustrates this principle clearly.

Judge Quealy, exercising his authority to manage his caseload and in an effort to move this case along expeditiously, set a trial date and ordered the parties to prepare a written stipulation before then. He ordered that no verbal stipulation would be accepted. Judge Quealy stated that there would be no trial without the written stipulation, because if he had to try cases "item by item and check by check . . . we'd never get our job done". (Petition for Writ of Certiorari, p. A44). Judge Quealy directed attorney Stewart to appear before him just prior to trial to confirm that the stipulation would be ready.[2] On February 21, 1978, the case was to either go to trial or be dismissed.

Instead, the Government's attorney, having failed to adhere to the court's established time-table, deliberately and by means of a knowing falsehood, frustrated Judge Quealy's attempt to direct this case's progress. The case was not tried or dismissed but was continued and remained on the court's docket for more than a year, during which time attorney Stewart's fraudulent act was concealed from petitioners.

This Court is all too familiar with the ever growing strain on the ability of the nation's courts to hear all those cases brought before them. Fraudulent conduct by an attorney which results in cases lingering on the court's docket when by right they should be dismissed is just as pernicious in its way as fabricated evidence.

The judicial system as an institution can properly function only if officers of the court abide by the system's rules. Lying and cheating cannot be tolerated, and no

2. Although Colonel Imhoff had made a specific request to also attend that conference, he was directed not to appear by Judge Quealy and was therefore not present.

judgment should stand when procured through means of counsel's dishonesty.

Respectfully submitted,

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